

DATE ISSUED: March 10, 1999

CASE NO.: 1997-ERA-51

In the Matter of

SUZANNE MCANENA
Complainant,

v.

TENNESSEE VALLEY AUTHORITY
Respondent,

Appearances:

Michael C. Subit, Esq.,
For the Complainant

Brent R. Marquand, Esq.,
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

PROCEDURAL HISTORY

This proceeding arose under the employee protection provisions of the Energy Reorganization Act of 1974 (the "Act"), 42 U.S.C. 5851, and the implementing regulations at 29 C.F.R. Part 24. Complainant, Suzanne McAnena, filed a complaint with the Secretary of Labor, on February 26, 1997, alleging that she was a protected employee engaged in a protected activity within the scope of the Act, and was separated by the Respondent, Tennessee Valley Authority (hereinafter "TVA") as a result of this activity.

A compliance investigation was conducted by the Atlanta, Georgia, Occupational Safety and Health Administration (OSHA), U.S. Department of Labor. On June 10, 1997, OSHA announced its determination that while the complainant's job duties involved activities which fell within the protections of Section 211 of the Energy Reorganization Act, the evidence did not support that her employer harbored any animosity against her because of such protected activities,

or that any adverse employment actions were motivated in reprisal for her engagement in such protected activities. Ms. McAnena sought a hearing before an administrative law judge.

I was assigned the matter on June 25, 1997 and issued a Notice of Hearing on July 3, 1997. The hearing, scheduled for November 13, 1997, was continued several times. On February 26, 1998 this matter was stayed because of a related administrative Equal Employment Opportunity (“EEO”) complaint. The hearing was finally scheduled for June 8, 1999.

TERMS OF AGREEMENT

On February 25, 1999, I received a copy of a Joint Motion for Dismissal and a Memorandum of Understanding and Agreement (EEO) from the parties. The Memorandum of Understanding and Agreement (ERA) was submitted on March 1, 1999. This Agreement was dated October 20, 1998. This Order deals solely with the ERA Agreement.

There were several conditions that had to be met before the ERA Agreement would be submitted to the DOL for approval. First, Ms. McAnena had to apply to the TVA Retirement System (TVARS) to be placed on disability retirement. In order for Ms. McAnena to be given the opportunity to apply for disability retirement, the Respondent reinstated her employment retroactive to the date of her September 26, 1997 termination. As a result of this reinstatement, the agreement provided that Ms. McAnena would not be entitled to wages, compensation, or any other employment benefits. Second, Ms. McAnena’s disability retirement application had to be approved by TVARS. Upon being approved by TVARS, this agreement and the agreement resolving Ms. McAnena’s EEO claim would be submitted to the DOL.

Once these conditions were met the agreement was submitted to me. The agreement provides that upon approval by TVARS of Ms. McAnena’s application for disability retirement, Ms. McAnena must voluntarily resign her TVA employment. The agreement also provides that Respondent will pay Ms. McAnena and her attorneys, Bernabei & Katz, specified sums of money. The payment to Ms. McAnena is designated as being for emotional distress, mental anguish, pain and suffering, humiliation, and damage to her professional reputation. Concerning the payment to Ms. McAnena, the agreement provides that Ms. McAnena is responsible for and legally bound to make payment of any and all taxes should the Internal Revenue Service or any other court or agency disagree with the characterization of the payment. The payment to Bernabei & Katz is designated as being for attorneys’ fees and costs.

The complainant further agrees to a “general release” of all claims against TVA, the TVA Board of Directors, and TVA’s officers, agents employees, and contractors as of the date of the agreement. Also, the agreement provides that TVA releases Ms. McAnena from any and all claims. Ms. McAnena’s Title VII claims are not released by this agreement, but they are released by the separate EEO Agreement. The parties agree to keep the matter of the agreement confidential, with some limited exceptions. The Agreement states that “nothing in this agreement shall be construed to prohibit Ms. McAnena from reporting any suspected instance of illegal

activity of any nature, any nuclear safety concern, any workplace safety concern, or any public concern to the United States Nuclear Regulatory Commission, the DOL, or any other Federal or State governmental agency.” Additionally, the Agreement provides that Ms. McAnena is not prohibited from participating in any administrative, judicial, or legislative proceeding or investigation that has not been resolved by the agreement.

REVIEW OF AGREEMENT

The agreement must be reviewed to determine whether the terms are a fair, adequate, and reasonable settlement of the complainant’s allegations. *See, e.g., Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip opin. at 2 and *Bunn v. MMR/Foley*, 89-ERA-5 (Sec’y Aug. 2, 1989). Moreover, review and approval of the settlement is limited to matters arising under the employee protection provisions under the jurisdiction of the Department of Labor, in this case the Energy Reorganization Act. *Mills v. Arizona Public Service Co.*, 92-ERA-13 (Sec’y Jan. 23, 1992); *Anderson v. Kaiser Engineers Hanford Co.*, 94-ERA-14 (Sec’y Oct. 21, 1994); and, *Poulos, supra*.

I find the terms of the “confidentiality” provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec’y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec’y May 11, 1994); *The Connecticut Light & Power Co. v. Secretary of United States Dep’t of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties’ confidentiality agreement except where disclosure may be required by law.

The “release” provision, paragraph 2, is also acceptable because it only limits the right to sue in the future on claims or causes of action that the parties may have as of the date of the agreement. *Armijo v. Wackenhut Services, Inc.*, 94-ERA-7 (Sec’y Aug. 22, 1994); *Saporito v. Arizona Public Service Co.*, 92-ERA-30, 93-ERA-26 and 93-ERA-43 (Sec’y Mar. 21, 1994); and, *McCoy v. Utah Power*, 94-CAA-1 and 6 (Sec’y Aug. 1, 1994).

The fact that the agreement does not contain the provisions found in 29 C.F.R. § 18.9(b) does not invalidate it as those provisions apply to consent findings not settlements. *Simmons v. Arizona Public Service Co.*, 90-ERA-6 (Sec’y Sept. 7, 1994).

The parties asked that the agreement be treated as “confidential commercial information” pursuant to the DOL’s Freedom of Information Act (“FOIA”) regulation at 29 C.F.R. § 70.26. In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ALJ March 11, 1997), Judge Kaplan invited the Administrative Review Board to address the apparent conflict between the Department of Labor’s FOIA responsibilities and the precedents discussing the importance of public disclosure of the true dollar amounts of whistleblower settlements. *See, i.e., Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). Judge Kaplan pointed out that the regulations and

the Secretary's policy appear to allow parties to so limit public access. *See, Klock v. Tennessee Valley Authority*, 95-ERA-20 (ARB, May 1, 1996); *Ezell v. Tennessee Valley Authority*, 95-ERA-33 slip opinion at 2 n. 3 (ARB, Sept. 19, 1996).¹ Thus, the agreement itself is not appended and is forwarded separately and marked "PREDISCLOSURE NOTIFICATION MATERIALS."

There are no further aspects of the agreement which need be discussed for purposes of this recommendation.

I have no basis on which to recommend that the amount agreed upon is not fair, adequate and reasonable. Nor do I have reason to believe other provisions in the agreement are inappropriate.

ORDER

It is hereby RECOMMENDED that the Secretary of Labor find the terms of the agreement fair, adequate and reasonable, and therefore approve the Memorandum of Understanding and Settlement (ERA). It is further RECOMMENDED that the complaint be dismissed with prejudice.

SO ORDERED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:SMG:dmr

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the

¹ In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Mar. 27, 1997), however, the ARB declined the ALJ's suggestion *sub silentio*. Rather, the ARB employed the following standard boilerplate language in approving the settlement:

The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.

Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).